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The Law School has sustained the loss of one of its closest and most valued friends. ALBERT MARTIN KALES, Harvard A.B. 1896, LL.B. 1900, died July 27 of typhoid fever. He was born March 11, 1875, attended St. Paul's School, took high rank in the Law School and had been practising in Chicago almost continuously since his graduation. He was for a number of years Assistant Professor and Professor of Law at Northwestern University, was Professor of Law at Harvard for one year in 1916–1917, and at the time of his death was Professorial Lecturer on Future Interests at the University of Chicago. In 1905 he published "Future Interests in Illinois," of which a much enlarged second edition entitled "Estates and Future Interests" appeared in 1920. While he is best known for his work in this field, his magazine articles and case books covered other legal subjects, and he wrote a short valuable book on Government. As a writer on the complicated branch of the law in which his greatest interest lay, he had no equal in the country, and his position at the Illinois bar was of the highest. Indefatigable, learned, charming, honest, vigorous and courageous, he does not need his able writings to preserve his happy memory.

COMMON LAW RULES OF EVIDENCE IN PROCEEDINGS BEFORE ADMINISTRATIVE TRIBUNALS.[1] — The elimination of the jury from

[1] This note is largely based on Frank A. Ross, "The Applicability of Common Law Rules of Evidence and Proof in Proceedings before Workmen's

many judicial proceedings calls for a readjustment in the law of evidence to meet the modern exigencies of justice. A pressure for less technical methods of proof is especially felt in proceedings before administrative tribunals. Coming in response to an urgent need for a more speedy and efficient administration of justice, composed of members whose opinions are tempered by the constant stream of cases which come before them, these tribunals may with safety be entrusted with wider discretion as to the mechanics of the hearing. Their action should be governed, not by rules, but by a standard of reasonableness, and the admission of any relevant evidence of sufficiently probative value, not particularly untrustworthy should be upheld.[2]

While this is the attitude of the courts in reviewing proceedings before certain administrative tribunals,[3] it has not been taken with reference to hearings before Workmen's Compensation Commissions, a most important group of cases especially requiring the greatest possible freedom from technicality. The Compensation Acts were passed to afford workmen a more simple and summary method of enforcing their claims.[4] The theory of this legislation is that compensation for injuries arising out of employment is a part of the expense of industry, ultimately to be borne by society. The widest range should be given the workman to prove an injury incurred in the course of his employment. Yet the appellate courts have tenaciously adhered to common law rules both as to the *quantum* and mode of proof, and have constricted the most liberalizing statutory provisions.

It is often difficult to prove accidents which result in the death of workmen. In such cases less direct testimony should be required and greater reliance placed on circumstantial evidence. Athough this is the attitude taken by Workmen's Compensation Commissions, courts frequently reverse awards on appeal because they are unsupported by sufficient evidence. The courts purport to apply a test which permits findings based on circumstantial evidence but

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Compensation Commissions," from a series of as yet unpublished Studies in Administrative Law. MS. copies in the Library of the Harvard Law School.

[2] Professor James B. Thayer, in his PRELIMINARY TREATISE ON EVIDENCE, has carefully traced the development of the law of Evidence and demonstrated its intimate relation to the jury. See also James B. Thayer, "The Jury and its Development," 5 HARV. L. REV. 357, 387. He has laid down two fundamental precepts: (1) all irrelevant evidence must be excluded; (2) all evidence that is logically probative is admissible, unless excluded by some rule or principle of law. These rules of exclusion developed because of a distrust of the jury and were the means of judicial oversight and control over its action. There being no jury in administrative proceedings, the reason for the application of these rules is weakened, and all relevant evidence should be admissible. The problem of controlling the operation of a body of experts is fundamentally different from that of controlling a jury. Far less restraint should be placed on administrative action and much more respect accorded to it.

[3] License Commissions are a common example. U. S. *ex rel.* Roop *v.* Douglass, 19 Dist. of C. 99 (1890); Hopson's Appeal, 65 Conn. 140, 31 Atl. 531 (1894).

[4] See Zechariah Chafee, Jr., "The Progress of the Law, 1919–1921, Evidence," 35 HARV. L. REV. 302, 305.

not those based merely on guesswork.[5] The difficulty in applying this test is indicated by the many reversals of the findings of commissions made presumably in an honest effort to follow it.[6] The readiness of appellate courts to reverse such findings is open to serious criticism. The findings of an administrative body created by the legislature to deal with a subject matter which the courts have proved unable to handle efficiently, should not be disturbed save with the greatest reluctance and only where such findings can be said to be arbitrary or capricious.

In several states an effort has been made to lighten the claimant's burden of proof by the creation of new presumptions.[7] The application of these presumptions has proved confusing and unsuccessful.[8] This seems inevitable where the presumptions, as here, have no

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[5] Peoria Ry. Terminal Co. *v.* Industrial Board, 279 Ill. 352, 110 N. E. 651 (1917).

[6] See cases cited in Frank A. Ross, *supra*, MS. 7–13. See also P. T. Sherman, "Evidence and Proof under Workmen's Compensation Laws," 68 U. OF PA. L. REV. 279. The attitude of appellate courts is illustrated in the leading case of Reck *v.* Whittlesberger, 181 Mich. 463, 148 N. W. 247 (1914).

[7] Maryland, Montana, New York, and Oklahoma have such statutes. The provisions in the New York statute are typical. CONSOL. LAWS, 67, § 21 provides that, "In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary

1. That the claim comes within the provisions of this chapter;
2. That sufficient notice thereof was given;
3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;
4. That the injury did not result solely from the intoxication of the injured employee while on duty."

See 69 U. OF PA. L. REV. 279.

[8] These presumptions have operated to shift the burden of going forward with the evidence on issues as to the accidental nature of the injury and as to its having arisen in the course of employment. Matter of Fogarty *v.* National Biscuit Co., 221 N. Y. 20, 116 N. E. 346 (1917); Fleming *v.* Robert Gair Co., 176 N. Y. App. Div. 23, 162 N. Y. Supp. 298 (1916). The plaintiff, however, still retains the risk of non-persuasion. Collins *v.* Brooklyn Union Gas. Co. 171 N. Y. App. Div. 381, 156 N. Y. Supp. 957 (1916). White *v.* Am. Soc. for Prevention of Cruelty to Animals, 191 N. Y. App. Div. 6, 180 N. Y. Supp. 867 (1920). Where the evidence is in conflict the cases furnish no clear test as to what is necessary for the plaintiff to sustain the burden of proof. Collins *v.* Brooklyn Union Gas Co., *supra;* Sullivan *v.* Industrial Engineering Co., 173 N. Y. App. Div. 65, 158 N. Y. Supp. 970 (1916); Fleming *v.* Gair Co., *supra*; Tucillo *v.* Ward Baking Co., 180 N. Y. App. Div. 302, 167 N. Y. Supp. 666 (1917); Folts *v.* Robertson, 188 N. Y. App. Div. 359, 177 N. Y. Supp. 34 (1919); McHale *v.* Sheffield Farms Co., 193 N. Y. App. Div. 541, 184 N. Y. Supp. 576 (1920); Jack *v.* Morrow Mfg. Co., 194 N. Y. App. Div. 565, 185 N. Y. Supp. 588 (1921). The first presumption, note 7 *supra*, does not apply to the question whether the plaintiff was an independent contractor. Kackel *v.* Serviss, 180 N. Y. App. Div. 54, 167 N. Y. Supp. 348 (1917). Nor does it apply on the issue of the degree and duration of the disability; nor to the question of the dependency of the claimants upon the deceased. Modra *v.* Little, 223 N. Y. 452, 119 N. E. 853 (1918); Kanzar *v.* Acorn Mfg. Co., 219 N. Y. 326, 114 N. E. 398 (1916); Pifumer *v.* Rheinstein & Haas, 187 N. Y. App. Div. 821, 175 N. Y. Supp. 848 (1919); Drummond *v.* Isbell-Porter Co., 188 N. Y. App. Div. 374, 177 N. Y. Supp. 525 (1919); Profeta *v.* Retsof Mining Co., 188 N. Y. App. Div. 383, 177 N.Y. Supp. 60 (1919). See P. T. Sherman, *supra*, note 5.

logical basis.[9] It should be unnecessary to resort to such artificial means of aiding the workman's case. A reduction in the *quantum* of proof, a wider discretion entrusted to the commission, and a more respectful attitude toward its findings would be more desirable.

Similarly, the unfortunate failure of the courts to appreciate the nature and purpose of proceedings before commissions, has led to the undermining of liberal provisions in statutes expressly freeing the commissions from statutory and common law rules of evidence.[10] Thus, a leading case [11] held that hearsay testimony admissible under such a statute should not be considered, and could not support an award without the corroboration of other competent evidence.[12] Although this case has been generally followed,[13] the New York Court of Appeals itself has given some indication of a growing dissatisfaction with the rule therein enunciated. Thus, corroboration by the surrounding circumstances inferentially pointing to an accidental injury has been held sufficient to sustain an award largely based on hearsay evidence.[14] An admission by the employer embodied in a report of the accident made by his clerk on hearsay information has been given the same effect.[15] Qualifications complicate, but do not efface the narrow rule established by the *Carrol* case. A more explicit statute is necessary empowering the commission to make its own

[9] For an excellent analysis of the nature and effect of presumptions see Zechariah Chafee, Jr., *supra*, note 3, at 310, *et seq.* It should be remembered that some statutory presumptions may have a logical core, and their value as logical inferences ought to be considered. Such is the presumption as to the causation of industrial diseases created by the English WORKMEN'S COMPENSATION ACT, 1906, § 8 (2).

[10] There are four types of statutes: (1) in Arizona and Alaska the statutes provide that the procedure shall be in accordance with the Com. Law rules of evidence; (2) in Cal., Conn., Ia., La., N. Y., Utah, Vt., Ohio, N. Dak., that the commission shall not be bound by common law or statutory rules of evidence; (3) in Mont., Mo., N. Y. and Pa., that the commission shall not be bound by technical rules of evidence; (4) in Ala., Idaho, Ill., Ind., and Va., that the process shall be as summary and simple as may be. These types cannot here be treated separately. Cases under the most liberal provisions are selected.

[11] Matter of Carroll *v.* Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507 (1916), reversing 169 N. Y. App. Div. 450, 155 N. Y. Supp. 1.

[12] The vice of this rule lies chiefly in the uncertainty as to how much corroboration is necessary. The commission's finding has been repeatedly reversed by a divided court on the ground of insufficient corroboration. This expensive litigation of questions of evidence, which it was the purpose of the Compensation Act to avoid, is itself a severe condemnation of the rule in the Carrol case. A much greater respect is due the findings of expert commissioners, and if given, would do much to discourage appeals other than those based on the merits of the controversy.

[13] Matter of Belcher *v.* Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735 (1918); White *v.* Am. Soc. for Prevention of Cruelty to Animals, *supra*, note 8; Jack *v.* Morrow Mfg. Co., *supra*, note 8.

[14] Matter of Fogarty *v.* National Biscuit Co., *supra*, note 8; Folts *v.* Robertson, *supra*, note 8.

[15] Lindquest *v.* Holler, 178 N. Y. App. Div. 317, 164 N. Y. Supp. 906 (1917); Anthus *v.* Rail Joint Co., 193 N. Y. App. Div. 571, 185 N. Y. Supp. 314 (1920). Another liberalizing element has been the doctrine that evidence introduced without objection at the hearing cannot be objected to on appeal. Hernon *v.* Holahan, 182 N. Y. App. Div. 126, 169 N. Y. Supp. 705 (1918). A recent English decision has refused to follow this doctrine. See note 17, *infra*.

rules permitting hearsay and other evidence which it deems reasonably probative and relevant.

A greater liberality has characterized the attitude of the courts on questions of exclusion of competent and admission of incompetent evidence.[16] But there still is a rigid adherence to common law requirements of confrontation and opportunity for cross-examination. This is illustrated by a recent English decision [17] where an award by an arbitrator based on *ex parte* hearings was reversed in spite of the fact that neither party had objected to this mode of procedure. Some American courts have even held *ex parte* hearings a violation of due process of law.[18] In this imposition on administrative tribunals of the common law rules of evidence, we have another instance of the administration of justice by the courts with reference to a picture of the legal order formed for an institution of the past, and applied to the modern workings of a fundamentally different tribunal.

DESCENT OF FOREIGN LANDS TO CHILD LEGITIMATED BY ADOPTION. — The California Civil Code[1] enacts that if the father acknowledges a child born out of wedlock and receives it into his family, he adopts the child, which then is deemed legitimate from birth for all purposes. The question, whether a child "adopted" in this manner could inherit lands of the parent situate in Illinois, was recently answered in the affirmative by the Supreme Court of that state.[2] The conflicting results of the few cases in which a similar problem has been in issue prompt an examination of the approach taken by this court. Conceivably, the child might have inherited either as a legitimated natural child, or as an adopted child. That there is more than a mere verbal difference between these two capacities with respect to descent may be seen by comparing the relevant statutory provisions in Illinois.[3]

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[16] Frankfort General Ins. Co. *v.* Pillsbury, 173 Cal. 56, 159 Pac. 150 (1916); Mesmer & Rice *v.* Industrial Accident Comm., 178 Cal. 466, 173 Pac. 1099 (1918).

[17] W. Ramsden & Co. *v.* Jacobs, [1922] 1 K. B. 640. For the facts of this case see RECENT CASES, *infra*, p. 102. It may well be that the case rightly holds *ex parte* hearings improper in view of Order XXXVI, Rule 49, SUPREME COURT OF JUDICATURE RULES. But the court should not have reversed this award where no objection was seasonably made to the procedure employed by the arbitrator.

[18] Carstens *v.* Pillsbury, 172 Cal. 572, 158 Pac. 218 (1916); Bereda Mfg. Co. *v.* Industrial Board of Ill., 275 Ill. 514, 114 N. E. 275 (1916), followed in Ruda *v.* Industrial Board of Ill., 283 Ill. 550, 119 N. E. 579 (1918); Gauthier's Case, 120 Me. 73, 113 Atl. 28 (1921).

[1] See § 230. ADOPTION OF ILLEGITIMATE CHILD. — "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth."

[2] McNamara *et al. v.* McNamara, 135 N. E. 410 (Ill., 1922). For the facts of this case see RECENT CASES, *infra* p. 104.

[3] See 1921 CAHILL'S ILL. REV. STAT., c. 39, § 3: "An illegitimate child, whose parents have inter-married, and whose father has acknowledged him or her as his child, shall be considered legitimate." c. 4, § 5: "A child so adopted shall be deemed for the purpose of inheritance . . . the child of the parents